



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Labatt Food Service, Inc.

File: B-259900

Date: May 3, 1995

Theodore M. Bailey, Esq., for the protester.
Barbara J. Stuetzer, Esq., and William E. Thomas, Jr., Esq.,
Department of Veterans Affairs, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protester whose offer expired prior to contracting agency's cancellation of solicitation is an interested party to protest cancellation where the contracting agency could properly ask the offeror to waive the expiration of its acceptance period.
2. Protest that contracting agency improperly canceled negotiated procurement is denied where the contracting officer reasonably determined that a new solicitation with less restrictive specifications presented the potential for increased competition or cost savings.

DECISION

Labatt Food Service, Inc. protests the cancellation of request for proposals (RFP) No. M3-Q20-94, issued by the Department of Veterans Affairs (VA) for the supply of food items, under VA's Subsistence Prime Vendor Program, to VA hospitals in the states of Texas and New Mexico. The agency canceled this solicitation, along with other solicitations issued under the Program, primarily because it believed a new solicitation with less restrictive specifications presented the potential for increased competition and cost savings to the government. Labatt challenges the reasonableness of the agency's cancellation decision.

We deny the protest.

The Subsistence Prime Vendor Program was created to replace VA's depot distribution system with a commercial product and distribution system. Solicitations covering 21 geographic regions were issued during the summer of 1994, with a total estimated value of \$33 million. With the exception of the specific food items to be supplied, all of the solicitations

were virtually identical. Each would result in a fixed-price requirements contract, with economic price adjustment,¹ for the distribution of approximately 700 food items. Precise packing and packaging specifications were set forth for each food item to be supplied, and qualification requirements applied to numerous food items; where applicable, the product, manufacturer, or source had to be qualified at the time of award. Each contract would be awarded to a single vendor, on an all-or-none basis, for a base year with up to two 1-year options. Award would be made to the offeror whose proposal represented the best overall value to the government.

Although the instant solicitation was distributed to 20 vendors, the agency received only three proposals by the August 16, 1994, closing date, including one from Labatt. While these technical proposals were being evaluated, and various clarifications requested and received, VA reviewed the lack of competition under these solicitations as a whole. Only 19 vendors responded to all 21 solicitations, and, of these, one withdrew its offers on 7 solicitations in objection to the pricing terms, packing and packaging specifications, and qualification requirements; 3 additional vendors took exception to the pricing terms; and, for 9 solicitations, only 1 or no offerors responded. In addition, VA's survey of firms not submitting offers showed that certain solicitation specifications, discussed below, were the primary reasons that firms elected not to compete. Finally, the assistant chief of the special contracts division reviewed the government estimates, as well as offers received, and discovered that the estimates were too old to be relied upon, and that offered prices were inflated to account for both the packing and packaging specifications and the economic price adjustment clause.

The contracting officers for the various solicitations were asked to evaluate the offers received to determine their potential for award. As to the three offers received under this solicitation, the contracting officer reported that Labatt, whose price was 11.64 percent higher than the government estimate, had met the qualification requirements and the packing and packaging specifications. Company B, whose price was 17.46 percent higher than the government estimate, offered numerous items that remained to be approved for packing and packaging discrepancies, and offered numerous items that remained to be qualified. Company C, whose price was 672 percent higher than the government estimate, had taken exception to the economic

¹The economic price adjustment clause allowed the successful contractor to request price adjustments based on the Producer Price Index, with a 10-percent cap.

price adjustment clause and was considered to be unacceptable. The record shows that similar problems existed for offerors under the remaining solicitations.

On December 16, the agency canceled all of these solicitations in the best interest of the government, citing four factors: lack of competition; inability to determine price reasonableness; restrictive specifications; and inappropriate pricing terms. The agency asserted that resolicitation in a manner more conducive to industry standards and practices was necessary and should increase competition and result in cost savings to the government by bringing government needs and procurement practices more in line with the commercial marketplace. Labatt filed this protest on January 5, 1995, after it was notified of the cancellation.

As an initial matter, VA argues that Labatt is not an interested party to challenge the cancellation of this solicitation because its offer expired on December 9, 1 week prior to the December 16 cancellation. VA asserts that since Labatt did not have a viable offer at the time of the cancellation, it would not be in line for award even if we were to sustain the protest. This argument is without merit. Where, as here, all proposals have expired, an agency may allow an offeror to waive the expiration of its proposal acceptance period and make award on the basis of the proposal as submitted, since a waiver under such circumstances is not prejudicial to the competitive system. See Western Roofing Serv., 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242. As a result, if we were to sustain this protest, VA could properly request that Labatt extend its expired offer and then make award to the firm. See East West Research, Inc., B-237844, Feb. 28, 1990, 90-1 CPD ¶ 248; TCA Reservations, Inc., B-218615, Aug. 13, 1985, 85-2 CPD ¶ 163.

Turning to the merits, under Federal Acquisition Regulation (FAR) § 15.608(b)(4), a procuring agency may reject all proposals (even if technically acceptable) received in response to a solicitation if cancellation is clearly in the government's best interest. Custom Training Aids, Inc., B-241446.2, Feb. 12, 1991, 91-1 CPD ¶ 151. In a negotiated procurement, the contracting officer has broad discretion in deciding whether to cancel a solicitation and to do so the contracting officer need only have a reasonable basis. See FAR § 15.608(b). A reasonable basis to cancel exists when a new solicitation presents the potential for increased competition or cost savings. G.K.S., Inc., 68 Comp. Gen. 589 (1989), 89-2 CPD ¶ 117; Bell Indus., Inc., B-233029, Jan. 25, 1989, 89-1 CPD ¶ 81. Therefore, an agency may cancel a solicitation if it materially overstates the agency's requirements and the agency desires to obtain

enhanced competition by relaxing the requirements. Xactex Corp., B-247139, May 5, 1992, 92-1 CPD ¶ 423; HBD Indus., Inc., B-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400.

The agency's decision to cancel the RFP and resolicit based upon relaxed specifications was reasonable. VA's inquiry into the limited competition elicited by these solicitations showed not only that certain solicitation specifications prevented vendors from competing, but that these same specifications were associated with the high prices submitted by some offerors.

First, the packaging and packing specifications inhibited competition because VA solicited other than the typical commercial or institutional packaging and packing sizes. Competing vendors had to seek last-minute sources to comply with the RFP's all-or-none requirement, or to offer alternate packaging and packing. In addition, some offered prices were 70 to 80 percent higher than the government estimates due to the packaging requirements.

Second, the qualification requirements were too cumbersome. Many vendors were unable to obtain quotes on proprietary items, many items were not normally stocked, some items were discontinued, some offerors failed to provide pricing on items because they could not locate a source, and the agency underestimated the number of items that would require testing, timely receipt, and repeated testing.

Third, the coupling of these qualification requirements with the packaging and packing specifications made it difficult for vendors to offer on an all-or-none basis. Further, VA noted that Federal Supply Schedule (FSS) pricing of numerous items was substantially lower than offered pricing; however, deleting the FSS items from the solicitations would contradict the principle of all-or-none supply behind the Prime Vendor Program.

Fourth, vendors took issue with the economic price adjustment clause because it was based on the Producer Price Index, which does not reflect specific regional fluctuations. In addition, some offerors appeared to have added a pricing factor to cover future commodity price increases beyond the 10-percent cap allowed by the clause.

Because the data collected by VA so clearly showed not only that these specifications were the cause of the limited competition under these solicitations, but that some offered prices were inflated because of these specifications, VA determined that a new solicitation, with relaxed specifications, presented the potential for increased competition and cost savings to the government. The draft resolicitation relaxes the packaging and packing

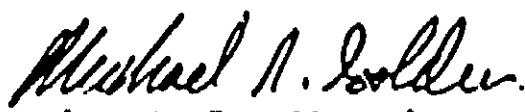
specifications, and eliminates both the all-or-none requirement and the economic price adjustment clause.

Labatt does not dispute the agency's findings, but essentially argues that since they were not made with respect to this specific solicitation, they do not justify its cancellation.

In our view, the data collected by VA is sufficiently connected to this solicitation to be utilized as a justification for its cancellation. It is clear that the competition received under this solicitation was very limited, as only 3 of the 20 solicited vendors submitted proposals. As to those three, none were technically acceptable at the time of cancellation: Labatt had not met one of the minimum performance requirements associated with filing reports; Company B had not met the qualification requirements; and Company C had taken exception to the economic price adjustment clause. In fact, each of the problematic solicitation specifications played a role in this procurement: Labatt initially offered packaging and packing that differed from that specified on several items; both Labatt and Company B had difficulty meeting the qualification requirements, with both offering a number of alternate items which necessitated approval; neither Labatt nor Company B initially met the all-or-none requirement; and Company C took exception to the economic price adjustment clause.

Although the VA's data does not establish with certainty that competition will be increased, such certainty is not required; based on the information collected by VA, relaxing the specifications presents the potential that competition will be increased, and therefore supports the cancellation. See Xactex Corp., supra. Once VA was cognizant that increased competition and cost savings were possible, given a revision of the solicitation's terms and conditions, it properly could cancel the RFP and resolicit for the requirement. G.K.S., Inc., supra. Since we conclude that this justification provided a reasonable basis for the solicitation's cancellation, we need not address the agency's remaining justifications.

The protest is denied.


for Robert P. Murphy
General Counsel